

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
APPENDIX**



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PL

# 74-2537

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

Docket No. 74-2537

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ANTHONY B. CATALDO, and ADA W. CATALDO,  
*Plaintiffs-Appellants,*  
*—against—*

THE UNITED STATES,  
*Defendant-Appellee.*

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APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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**DEFENDANT'S-APPELLEE'S APPENDIX**

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HON. PAUL J. CURRAN  
*United States Attorney*  
Southern District of New York  
United States Courthouse  
Foley Square  
New York, New York 10007  
*Attorney for Defendant-Appellee*



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**PAGINATION AS IN ORIGINAL COPY**

TABLE OF CONTENTS

	<u>Page</u>
Docket Sheet .....	GA 1
Letter of Anthony B. Cataldo, dated June 13, 1974 .....	GA 5
Notice of Motion and Affidavit of David P. Land, dated November 22, 1974 .....	GA 8
Affidavit of Anthony B. Cataldo, dated December 4, 1974 .....	GA 13
Notice of Motion and Affidavit of David P. Land, dated December 12, 1974 ...	GA 15
Notice of Motion and Affidavit of David P. Land, dated January 9, 1975 .....	GA 21
Affidavit of Anthony B. Cataldo, dated January 14, 1975 .....	GA 29

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CIVIL DOCKET 69 Civ II 407

UNITED STATES DISTRICT COURT

DDN SE

Docket Sheet

69 Civil 407

GA 1

JUDGE CANTRELL

Jury demand date: 9/2/69 by Defendant

U. S. Form No. 106 Rev.

TITLE OF CASE

JUDGE LEVET

JUDGE DUFFY  
ATTORNEYSANTHONY B. CATALDO  
ADA W. CATALDO

vs.

UNITED STATES OF AMERICA

For plaintiff:

ANTHONY B. CATALDO PRO. SE.  
52 Wall St.  
New York 10005

For defendant:

United States Attorney (Richard S. Rudick)  
S.D.N.Y. U.S. Court House, Foley Sq. NY 10007  
264-6337

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed X	Clerk	1-21-70	A CATALDO 15	-	
		2-4-70	U.S. TICKS	15	-
P.S. 6 mailed ✓	Marshal	8/31/70	CATRDO 50	-	
		9/17/70	U.S. TICKS	50	-
Basis of Action:	Docket fee	9/14/70	CATRDO 5	-	
recover sum of money assessed against pltf's	Witness fees	11/4/70	15	-	
\$2,718.49			WILLIAMS	5	-
Action arose at:	Depositions				

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PRO SE

JUDGE STEWART

JUDGE LEVET PRO SE

GA 2

DATE	PROCEEDINGS	Date Ord Judgment
Jan. 31-69	Filed complaint and issued summons	
Feb. 24, 69	Filed summons and return Serveyed the United States of America mailing to the Atty Gen., Wash.D.C. by Certified mail receipt # 559295 - United States of America by Pauline Trois, Clerk in the U.S. Atty's Office S.D.N.Y. on Feb. 11.69	
Sept. 2-69	Filed ANSWER to complaint and Jury Demand.	USA
Oct/11/69	Filed Deft's notice to take deposition of Pltff.	
Oct. 30-69	Filed Plaintiff's Interrogatories.	
Feb. 13, 70	Filed pltff's Affidavit and notice of motion Re; Strike Answer Ret. 2-19-70	
Feb. 17-70	Filed Answers to Interrogatories.	
Apr. 3- 70	Filed Memo Endorsed on motion papers filed Feb 13-70, "Inasmuch as daft has belatedly served its answers to pltff's interrogs, this motion to strike deft's answer because of its failure to answer the interrogs will be denied. The pre-Trial Examiner has informed the Court, however, that certain of the answers to interrogs are unsatisfactory. In an effort to avoid further motions and to save time for all concerned, the parties are directed to produce all their books and records before Pre-Trial Examiner Potter at 10 am on 4-16-70 and to confer with him with a view to clarifying deft's answers to the interrogs and defining the issues to be tried ----So Ordered: McLean, J. ---Special Master's Report by Potter annexed hereto. m/n	
Aug. 4-70	Filed deft's res ponse to pltff's exceptions.	
12-4-70	Filed Pltff's exceptions to deft's responses to interrogatories	
12-4-70	Filed pltff's demand	
Dec. 4-70	Filed 2nd Memo Endorsed on Notice of Motion filed 2-13-70. Pltffs' motion is denied and their objections to deft's answers to their interrogatories are overruled. So, Ordered: McLean, J. M/N	
Dec. 11-70	Filed pltff's Notice of Motion Re: Reargument Ret. 12-17-70.	
Dec. 11-70	Filed pltff's Memorandum on motion for reargument	
Dec. 16-70	Filed deft's Memorandum of law in opposition to pitff's motion for reargument	
Dec. 21-70	Filed Memo Endorsed on notice of motion filed 12-11-70--Motion for reargument denied. So Ordered: McLean, J.	
Jan. 7-71	Filed pltffs' notice to take deposition of deft on 1-22-71	
Jan. 26-71	Filed pltffs' notice to admit	
Jan. 26-71	Filed order that pltffs' scheduled deposition is adjourned to the 8th of February 1971 at 10 o'clock A.M. at the office of the Clerk of the Court, Foley Square, NYC, NY Cannella, J. M/N	
Feb. 26-71	Filed deft's Response To Request For Admissions	
Apr. 29-71	Filed deft's written interrogs. and request for documents.	
Jun. 16-71	Filed pltff's interrogs.	
Sep. 22-71	Filed pltff's notice of motion. Re: Compel appearance. Ret. 9-30-71	
Sep. 29-71	Filed deft's affidavit in opposition to pltffs motion to impose sanctions.	
Sep. 30-71	Filed memo endorsed on motion filed 9-22-71---Motion is withdrawn as the parties have agreed to set deposition of the examiner down for 10-13-71 etc..So ordered- Ryan, J. m/n	
Nov. 19-71	Filed pltff's notice of motion. Re: Summary Judgment. Ret. 12-7-71	
Jan. 4-72	Filed brief of the pltffs on their motion for summary judgment.	
Jan. 10-72	Filed deft's statement of material facts at issue.	
Jan. 10-72	Filed affidavit in opposition to pltffs' motion for summary judgment.	
Jan. 10-72	Filed deft's memorandum of law in opposition to pltffs' motion for summary judgment.	

CONTINUED ONLY COPY AVAILABLE

DATE	PROCEEDINGS
Jan 17-72	Filed MEMO. END. on motion filed 11-19-71 The motion for summary judgment is denied. Weinfield J. -mailed notice.
Jan 17-72	Filed deft's NOTE OF ISSUE and statement of readiness.
Feb. 23-72	Filed Deposition of deft., by Robert Levine, taken by pltff; -mailed notice.
May 10, 73	Non-Jury trial begun and cont'd/ before LEVET,J.
May 11, 73	Trial cont'd.
May 14, 73	Trial cont'd and Concluded. Dec. Res.
May 18, 73	Filed ORDER: Adjudged that Anthony B. Cataldo is guilty of contempt of court, and it is further ADJUDGED that the said Anthony B. Cataldo be fined the sum of Fifty (\$50.00) dollars. LEVET, J. and Clerk
May 25, 73	Filed Govt. supplemental memo.
Jun. 13, 73	Filed MEMO: At the completion of the trial of this action the court granted leave to pltfs to submit papers in support of motion to amend comp. to include items pltfs contended were not covered at trial. *** Pltfs. motion to amend comp. is denied and the trial is not to be reopened. ( See memo for dealings with each item which pltfs. allege in support.) (6 Pages) SO ORDERED. KNAPP, J. N/M by Pro Se.
Jun 12, 73	Filed MEMO. Pltf. motion to amend the comp. to assert a defense based upon the U.S. alleged failure to make a timely assessment is denied. SO ORDERED. LEVET, J. (n/m by Pro Se).
Jun. 27, 73	Filed MEMO: Pltf. pursuant to an affdvt. received 6/25/73, seek to reopen the trial to introduce alleged evidence concerning handwritten notes by I.R.S. Agent Robert Levine. The admissibility of such evidence was considered at trial and deemed irrelevant. This court maintains such ruling. Pltf. motion is denied. SO ORDERED. LEVET, J. (n/m by Pro se)
Jun. 28, 73	Pltfs. proposed findings of facts and conclusions of law.
Jun. 29, 73	Filed Supplemental affdvt in support of pltf motion for judgment.
Jun. 29, 73	Filed Summary of defts. positions in disallowing certain expenses. By Pltf.
Jun. 29, 73	Filed pltfs. list of claimed expenditures.
Jun. 29, 73	Filed pltfs. affdvt. Re: adjourning one week.
Jun. 29, 73	Filed Defts. trial memo.
Jun. 29, 73	Filed defts. Reply memo.
Jun. 29, 73	Filed pltfs. affdvt. and notice of motion, Re: supplement statement of issurs or amend comp.
Jun. 29, 73	Filed pltfs. memo of issues.
Jun. 29, 73	Filed govts. memo in opposition to pltfs. application to submit further evidence.
Jun. 29, 73	Filed memo of pltfs in opposition to defts. claims regarding petty cash disbursements.
Jun. 29, 73	Filed pltf. trial memo.
Jun. 29, 73	Filed defts. memo in opposition to pltfs. motion to amend comp.
Jun. 29, 73	Filed defts. reply memo.
Jun. 29, 73	Filed pltf. affdvt. Re: additional offers of proof.
Jun. 29, 73	Filed pltfs. post trial memo.
Jun. 29, 73	Filed OPINION # 39645: Findings of fact and conclusions of law. *** This Court has jurisdiction over the subject matter and the parties to this action. Pltfs. are not entitled to a tax refund for the year 1963. Judgment is granted to the U.S.A. dismissing the comp. with prejudice. Costs of the action are awarded to the U.S. Settle judgment on notice in accordance herewith. LEVET, J. (43 Pages) (n/m by pro se)

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Cont'd on page #4

## JUDGE LEVET

GA 4

69 Civ

69 Civ 407 Anthony B. Cataldo ,etano

vs. U.S.A.

Page 4

DATE	PROCEEDINGS	Date O Judgme
Jul. 17-73	& Judgment: Filed Order that pltff's take nothing, that judgment is hereby granted to the deft. & complaint is dismissed with prejudice, Costs of this action, as fixed by the clerk of the court, are awarded to deft. Levet, J. Judgment Ent. Clerk. No appearance in opposition. Bill of costs taxed in favor of U.S.A on 7-17-73 in the amount of, \$104.00 & docketed as Judgment #73,613.	
Jul. 17-73	Filed Bill of Costs in the sum of \$104.00 & docket as Judgment , #73,613.	
Jul 19-73	Filed notice of entry copy of judgment and bill of costs dtd 7/17/73.	
Sep. 17-73	Filed pltff's notice of appeal from final judgment dismissing this, action entered on 7-17-73. Mailed copy to U.S. Attorney.	
Sep. 28-73	Filed transcript of <del>transcript</del> record of proceedings of 5-11-73.	
Oct. 4-73	Filed transcript of proceedings dated May 10, 11 & 12 1973	
Oct. 7-73	Filed Bond undertaking for costs on appeal in the sum of \$250.00, by National Surety Corp.	
Oct. 10-73	Filed notice that record on appeal has been certified & transmitted to the U.S.C.A.	
Oct. 17-74	Filed True copy of Mandate & order from the USCA: Ordered that the judgment of District court is affirmed with costs to be taxed, against the appellants. Docketed as judgment #74,745 on Sept. 18-74. Statement of costs attached in the sum of \$323.64. Ent. 9-23-74.	
Oct. 11-74	Filed affidavit of David P. Land in opposition to motion by Anthony B. Cataldo Re: contempt fine.	
Oct. 17-74	Filed Memo-Decision #41316: Anthony B. Cataldo was in contempt by reason of his acts during the trial. A contempt fine of \$50 was imposed. Pltff moved for an order remitting the penalty . I see no basis whatsoever for the granting of the application made by Cataldo. It is therefore denied. So ordered. Levet, J.	
Oct. 10-74	Filed pltff's affidavit & notice of motion to remitting the penlty.	
Oct. 10-74	Filed pltff's brief in support of his motion RE: penalty.	
Nov. 15-74	Filed pltff's notice of appeal to the USCA from order of Oct. 17-74 denying his motion to vacate the order of contempt. Mailed copy to U.S. Attorney.	
Dec. 17-74	Filed deft's affidavit & notice of motion to dismiss notice of appeal filed by pltff's on 11-15-74 (This motion received in chambers on 11-22-74).	
Dec. 17-74	Filed affidavit by A.B. Cataldo in opposition to deft's motion to dismiss appeal.	
Dec. 17-74	Filed Memo-endorsed on deft's motion to dismiss notice of appeal. Motion withdrawn. See motion by U/S attorney dated 12-12-74. So ordered. Levet, J.	
Dec. 17-74	Filed deft's notice withdrawing motion.	
Dec. 13-74	Filed notice that the record on appeal has been certified & transmitted to the USCA on this 13th day of Dec. 1974.	

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**Letter of Anthony B. Cataldo,  
dated June 13, 1974**

**RETYPED FOR CLARITY**

GA 5

June 13, 1974

Re: Cataldo v. U.S.  
73-2602

Hon. A. Daniel Fusaro  
Clerk U.S. Court of Appeals  
Foley Square  
New York, N.Y. 10007

Dear Sir:

I wish to call the courts attention to the case of Lim Kwock Soon v. Brownell, 5th C.A., 369 F. (2) 808, which I just found, because the Court of Appeals in that case set aside its prior judgement, 253 F. (2) 809, because it had been discovered that it was based upon false facts. In this case, the decision of the trial Court is based, in part, upon the false testimony of Internal Revenue Agent, Levine. The court disallowed some \$3800. of petty cash expense because Levine testified that he had never seen the diary of the taxpayer in which the petty cash items had been noted, but that he had only seen the yellow pages which are marked Exhibit 29 for identification. Yet, on the pre-trial deposition at which he had testified he said he had been given the diary, A 277-A A 278 during his audit. The trial court would not permit other statements that he had had the diary and had worked from it. This evidence was brought out by defense counsel in the deposition (A 25). The court refused the offer (A38). Plaintiff testified A301-A302 that he had given the diary to all three auditors who had examined his records prior to the deficiency letter, and that he had never submitted the yellow pages which are Exhibit 29 for identification to any of the auditors, as a separate exhibit, as they appeared when they were offered to the court.

Also note the defendant's answer to plaintiff's interrogatory No. 3, which admits the claim to the petty cash expense being noted in the diary.

It is submitted, that Levine's testimony on the trial was false. Such false testimony was sought by defense counsel in his efforts at taking advantage of the fact that the diary was lost in 1972 through no fault of the plaintiff.

Right up to the eve of trial defense counsel had sought to examine the diary. More than one year before trial he had served a notice of inspection and plaintiff had brought to him, on the return date, all records including the diary. All the records but the diary were left with defense counsel. The diary was taken back

by plaintiff and claiming privilege since the diary contained notations of work done for client's, plaintiff said that further inspection would be refused unless defense counsel obtained an order from the court directing such inspection. No motion was made and no order was obtained. But, defense counsel did see the diary in plaintiff's possession.

Then, from the moment that defense counsel learned that the diary had been lost, he began to take advantage of that fact seeking to place plaintiff under the burden of proving items, that required the diary's production for proof. That effort was so strong that on the second day of trial, during a recess in the testimony of agent Levine after Levine had denied ever having the diary but he had admitted, in his deposition, that he had seen the diary, defense counsel asked plaintiff to let him have Exhibit 29 for identification, took the exhibit to Levine far away from plaintiff to be out of earshot, and conferred. When trial resumed, defense counsel asked Levine whether when he had said diary on the deposition he had meant the yellow sheets of paper that were Exhibit 29 for identification. The witness said yes. The court made the cross-examination of the witness impossible. It even denied the offer of proof of page 111 of Levine's deposition which clearly sets forth a colloquy which shows that both Levine and defense counsel knew of the diary on that day (A25, see page 111 of Document 34 of the record).\*

This effort of defense counsel is plain subornation of perjury. Plaintiff complained to the trial court. The court did nothing to help plaintiff. Plaintiff complained to the United States Attorney for this district. That official did nothing. He is complaining to this Court. Such an act is a crime, but no one in authority has been willing to prosecute or protect plaintiff from the crime. The crime has provided false testimony upon which the court below relied and consequently, the trial court's decision ought to be set aside. See also the discussion on fraud upon the court vitiating the judgments resulting therefrom at 11 Wright & Miller, Federal Practice and Procedure, Section 2870. At page 256 of said section the authors discuss fraud when it is perpetrated by an attorney rather than by a layman. When the perjury has been perpetrated by an attorney, there is no question that it is considered a fraud upon the court. Such was the Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, case and followed in Restatement, Judgments, Supp. 1948, Sec. 126, comment c. Also see Toscano v. Comm'r., 441 F. (2) 930.

Also, on the subject of whether the order of contempt may be dealt with by this court where the appeal is from the final judgment, this court is respectfully referred to 11 Wright & Miller, Federal Practice and Procedure, Section 2960. At page 592 of said section 2960, the authors say: "A civil contempt against a party is a nonfinal order and no appeal is available until there is a final

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\* See Levine at pp. A 274 - A 298; recess at A 277.

judgement in the entire action." While the contempt here does appear to be a criminal contempt, nevertheless, the court itself has called it a civil contempt. The contemnor is a party and the United States is a party. The fact is that the trial judge acted as though he was penalizing plaintiff for suing the defendant. See its remarks (A89) just at the beginning of the trial where the court without any cause for the remark said, "---If you go on, I am going to consider holding you for contempt.---Now you know." The court had already made up its mind to hold plaintiff-counsel for contempt.

Nevertheless, a separate appeal from the order of contempt did not seem proper or necessary because the court had called the order a civil contempt order and it had used the caption of this case. This appeal followed in regular order. Would it be just to refuse to review it? At least, a meritless finding of contempt can be reason enough to find that the trial court had been partial to defendant or biased toward plaintiff and that attitude ruled the findings of fact made. So that, at least to that extent this court may say that the order was improvidently made.

Respectfully,

/s/

C.C. Hon. Paul J. Curran  
United States Attorney  
Hon. Wilford Feinberg, Presiding Judge  
Hon. Leonard Moore, Judge  
Hon. Henry J. Friendly, Judge  
United States Court of Appeals,  
Second Circuit

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Notice of Motion and Affidavit  
of David P. Land, dated  
November 22, 1974

GA 8

MEMO E  
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x  
ANTHONY B. CATALDO and :  
ADA W. CATALDO,

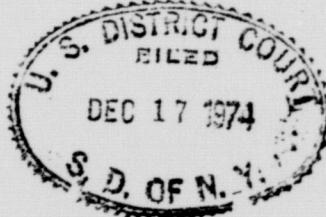
Plaintiffs, :

NOTICE OF MOTION

69 Civ. 407 (RHL)

- v -

UNITED STATES OF AMERICA, :  
Defendant. :



----- x  
S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of David P. Land, Assistant United States Attorney, the defendant will move this Court by submission, before the Honorable Richard H. Levet, on the 6th day of December, 1974, at 9:30 A.M., in Room 2103 of the United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 7 of the Federal Rules of Appellate Procedure, dismissing the Notice of Appeal filed by plaintiffs on November 15, 1974 for their failure to post security for payment of appellate costs, unless on or before the return date hereof plaintiffs file a bond in the amount of \$250.00.

Dated: New York, New York

November 22, 1974

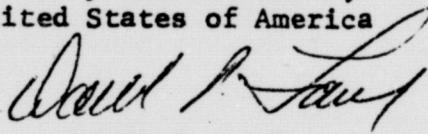
-3082  
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GA 9

Yours, etc.,

PAUL J. CURRAN  
United States Attorney for the  
Southern District of New York,  
Attorney for Defendant,  
United States of America

By:



DAVID P. LAND  
Assistant United States Attorney  
Office and Post Office Address:  
United States Courthouse  
Foley Square  
New York, New York 10007  
Tel.: 212 791-0054

TO:

ANTHONY B. CATALDO  
Attorney pro se and  
for Plaintiff  
111 Broadway  
New York, New York 10006

5504  
537) UNITED STATES DISTRICT COURT

GA 10

SOUTHERN DISTRICT OF NEW YORK

----- x  
ANTHONY B. CATALDO and  
ADA W. CATALDO, :

Plaintiffs, AFFIDAVIT  
:  
- v - 69 Civ. 407 (RHL)

UNITED STATES OF AMERICA, :  
  
Defendant.

----- x  
STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

DAVID P. LAND, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in  
the office of Paul J. Curran, United States Attorney for  
the Southern District of New York, and I make this affidavit  
in support of defendant's motion to dismiss plaintiffs'  
Notice of Appeal for failure to post security for costs  
unless they post a \$250 bond forthwith.

2. On November 15, 1974, plaintiffs filed a  
Notice of Appeal in respect of the October 17, 1974 order  
of this Court.

3. The records of this Court do not reflect that  
plaintiffs filed any bond or other security for costs.  
On November 21, 1974, I spoke to Mr. Cataldo on the tele-  
phone and he confirmed that no bond or security had been  
posted.

4. Failure to post a bond or other security to secure the appellee's costs on appeal is grounds for dismissal of the Notice of Appeal.

5. Rule 7 of the Federal Rules of Appellate Procedure states:

... in all civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal ... The bond or equivalent security shall be in the sum or value of \$250 unless the district court fixes a different amount ...

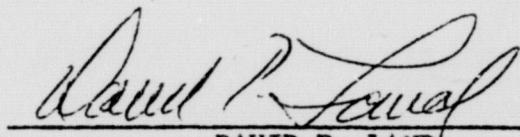
9 Moore, Federal Practice, ¶207.02 states that the "filing of a bond for costs is mandatory ..." and that dismissal of a Notice of Appeal for failure to file a bond for costs "is an available sanction ..." 9 Moore, supra, ¶207.04 states that "a motion for additional security should be addressed in the first instance to the district court ..." In this instance, the United States is, in effect, moving to increase the security for our costs from zero to \$250.00; and in the event such \$250.00 security is not filed on or before the return date of this motion to dismiss the Notice of Appeal. Our records reflect that in Mr. Cataldo's other actions and appeals, he has not yet fully satisfied the award of costs to the United States, and that about \$150.00 is due and owing. Accordingly, unless a bond for costs in the

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GA 12

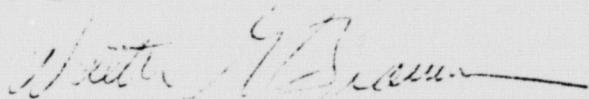
amount of \$250.00 is posted, there is no assurance that an award of costs in favor of the United States will be satisfied.

WHEREFORE, it is respectfully requested that unless a bond for costs in the amount of \$250.00 is posted on or before the return date of this motion, an order be entered dismissing the Notice of Appeal filed on November 15, 1974.

  
DAVID P. LAND  
Assistant United States Attorney

Sworn to before me this

22nd day of November, 1974



WALTER G. BRANDON  
Notary Public, State of New York  
No. 24-024200  
Qualified in Kings County  
Cert. Expd. in New York County  
Term Expires March 31, 1975

Affidavit of Anthony B. Cataldo,  
dated December 4, 1974

GA 13

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
ANTHONY B. CATALDO and ADA W. CATALDO :

Plaintiff, :

v. :

UNITED STATES OF AMERICA, :

Defendant. :

-----  
In the Matter of the Civil Contempt of :  
ANTHONY B. CATALDO X

-----  
STATE OF NEW YORK } SS.

COUNTY OF NEW YORK)

ANTHONY B. CATALDO being duly sworn deposes and says  
that he is the alleged contemnor above-named. This affidavit is  
filed in opposition to the motion being made by Mr. Land before  
Richard  
the Hon. H. Levet to dismiss the appeal to the Court of Appeals  
from the order of this court filed October 17, 1974 denying de-  
ponent's motion to vacate the order holding him in contempt dated  
May 18, 1973.

Mr. Land's motion to dismiss is placed upon Rule 7 of  
the Appellate Rules which provides that a \$250. bond shall be  
posted on Civil Appeals. The instant appeal is not a Civil Appeal.  
It is a criminal appeal. The Court of Appeals in its decision on  
the civil appeal taken in this case, held that the very same or-  
der of contempt was reviewable only as a criminal contempt and it  
refused to consider it as part of the civil appeal. Mr. Land had,

in the government's brief, treated it as a criminal contempt. Now, he treats it as a civil contempt. However, the point is that the Court of Appeals has held that the order is a criminal contempt and a review of it could only be had as on a criminal appeal. This is controlling, and no cost on appeal bond is required in this matter. The rule relied upon by Mr. Land is not applicable and the motion should be denied.

Further, Mr. Land misquotes deponent. Deponent told Mr. Land that no such bond is needed on criminal appeals according to the Rules, not what he claims in his affidavit.

Nor is the caption on Mr. Land's motion the proper caption. The one shown above is the proper caption because it was the one used by the court on the original order and it is the one used in subsequent papers. No doubt, Mr. Land believed that the use of the wrong caption might help in proving that this is a civil appeal.

This motion is ill-conceived and ill-advised. It has caused deponent loss of time and the unnecessary expenditure of money.

WHEREFORE it is respectfully submitted that the motion be denied with costs.

Sworn to before me this

4<sup>th</sup> day of December, 1974

\_\_\_\_\_  
ANTHONY B. CATALDO

PL:eb  
3537  
73-3082)  
74-3732)

Notice of Motion and Affidavit of  
David P. Land, dated December 12, 1974

GA 15

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x  
ANTHONY B. CATALDO and :  
ADA W. CATALDO,

Plaintiffs, : WITHDRAWING MOTION

- v -

UNITED STATES OF AMERICA,

69 Civ. 407  
(BPH) DISTRICT C  
FILED

Defendant. :

DEC 17 1974

S. D. OF N.Y.

----- x  
S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of David P. Land, the defendant United States of America moves this Court by submission before the Honorable Richard H. Levet, for an order withdrawing the defendant's motion pursuant to the Notice of Motion dated November 22, 1974, which motion sought to dismiss plaintiff Anthony B. Cataldo's Notice of Appeal filed on November 15, 1974 for failure to post appropriate security as required by Rule 7 of the Federal Rules of Appellate Procedure, such withdrawal of the November 22, 1974 motion being made upon reliance on Mr. Cataldo's sworn representation as set forth in his December 4, 1974 affidavit in opposition to said November 22, 1974 motion that "The instant appeal is not a civil appeal. It is a criminal appeal."

Dated: New York, New York  
December 12, 1974

L:eb  
537  
3-3082)  
-3732)

GA 16

Yours, etc.,

PAUL J. CURRAN

United States Attorney for the  
Southern District of New York,  
Attorney for Defendant,  
United States of America

By: *David P. Land*  
DAVID P. LAND  
Assistant United States Attorney  
Office and Post Office Address:  
United States Courthouse  
Foley Square  
New York, New York 10007  
Tel.: 212 791-0054

TO:

Anthony B. Cataldo  
Attorney pro se and  
for Plaintiffs  
111 Broadway  
New York, New York 10006

PL:eb  
3537  
3-3082)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
ANTHONY B. CATALDO and  
ADA W. CATALDO,

AFFIDAVIT

Plaintiffs,

: 69 Civ. 407  
(RHL)

- v -

UNITED STATES OF AMERICA, :  
Defendant.

----- x  
STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

DAVID P. LAND, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and I represent the defendant, United States of America, in the above-captioned action. This affidavit is submitted in support of the defendant's application to withdraw its motion pursuant to the Notice of Motion dated November 22, 1974.

2. On November 15, 1974, plaintiff, Anthony B. Cataldo filed a Notice of Appeal in respect of the October 17, 1974 order of this Court which order denied Mr. Cataldo's motion to vacate the May 18, 1973 order of

this Court holding him in contempt and fining him \$50.00. In a prior proceeding before the United States Court of Appeals for the Second Circuit, that Court held that no review of the May 18, 1973 contempt order was possible because no Notice of Appeal was timely filed. Cataldo, et ux. v. United States of America, Docket No. 73-2602 (No. 1105, 2d Cir., June 25, 1974). It appears that Mr. Cataldo's current Notice of Appeal is an attempt to circumvent the prior holding by the Court of Appeals and to accomplish indirectly that which Mr. Cataldo failed to accomplish directly.

3. In response to Mr. Cataldo's November 15, 1974 Notice of Appeal, the United States on November 22, 1974 moved this Court for an order dismissing the November 15, 1974 Notice of Appeal because no appeal bond or security for costs had been posted as required by Rule 7 of the Federal Rules of Appellate Procedure. In response and opposition to our motion, Mr. Cataldo stated in his affidavit of December 4, 1974 that security for costs is required only in <sup>civil</sup> ~~criminal~~ appeals. In that affidavit, <sup>BL</sup> Mr. Cataldo represented that "the instant appeal is not a civil appeal. It is a criminal appeal." I am relying upon that representation in making this current application to withdraw our motion made pursuant to our November 22, 1974 Notice of Motion.

4. Notwithstanding that the Court of Appeals held on June 25, 1974 that it had no jurisdiction to review the May 18, 1973 contempt order, I believe that Mr. Cataldo's instant November 15, 1974 Notice of Appeal is jurisdictionally defective for an additional and separate reason.

53537

Rule 4(b) of the Federal Rules of Appellate Procedure provides that "In a criminal case the notice of appeal by the defendant shall be filed in the district court within 10 days after entry of the judgment or order appealed from." The order currently appealed from was entered on October 17, 1974 and the notice of appeal was not filed until November 15, 1974. Thus, because Mr. Cataldo represents that his current appeal is an appeal from a criminal matter, his notice of appeal is untimely and therefore his appeal is jurisdictionally infirm. Had Mr. Cataldo represented that his current appeal was an appeal from a civil matter, the notice of appeal would have been timely because Rule 4(a) of the Federal Rules of Appellate Procedure allows 60 days to file a notice of appeal from entry of an order in a civil matter in which the United States is a party. Of course, as to civil appeals, security for costs is required.

5. As to the current appeal, the Clerk of the United States Court of Appeals for the Second Circuit has entered an order directing that the record on appeal be filed on or before December 20, 1974, that appellant's brief and joint appendix be filed on or before January 13, 1975, and that appellee's brief be filed on or before February 13, 1975. Should Mr. Cataldo prosecute his appeal by the filing of a record and the filing of a brief and appendix, the United States will move to dismiss the appeal for failure to file a timely notice of appeal and because of the binding effect of the prior holding by the Court of Appeals. In lieu of the need for further litigation on this point which will occupy the limited time of the Court of Appeals, Mr. Cataldo may wish to voluntarily withdraw his current Notice of Appeal.

David P. Land  
DAVID P. LAND  
Assistant United States Attorney

Sworn to before me this  
12<sup>th</sup> day of December, 1974  
Walter G. Brannon

WALTER G. BRANNON  
Notary Public, State of New York  
No. 24-054560  
Qualified in Kings County  
Cert. filed in New York County  
Term Expires March 30, 1975

DPL:eb  
74-3732Notice of Motion and Affidavit of  
David P. Land, dated January 9, 1975

## UNITED STATES COURT OF APPEALS

## FOR THE SECOND CIRCUIT

Filed

1/10/75----- x  
ANTHONY B. CATALDO and :  
ADA W. CATALDO,Plaintiffs-Appellants, : NOTICE OF MOTION- v - : Docket No.  
74-2537

UNITED STATES OF AMERICA, :

Defendant-Appellee. :

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of David P. Land, Assistant United States Attorney, the defendant-appellee, United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, will move this Court on the 4<sup>th</sup> day of February, 1975, for an order dismissing the Notice of Appeal filed on November 15, 1974.

Dated: New York, New York

January 9, 1975

DPL:eb  
74-3732

GA 22

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Yours, etc.,

PAUL J. CURRAN  
United States Attorney for the  
Southern District of New York,  
Attorney for Defendant-Appellee,  
United States of America

By: *AS*

DAVID P. LAND  
Assistant United States Attorney  
Office and Post Office Address:  
United States Courthouse  
Foley Square  
New York, New York 10007  
Tel.: 212 791-0054

TO:

ANTHONY B. CATALDO  
Attorney pro se and  
for Plaintiff  
111 Broadway  
New York, New York 10006

DPL:eb  
74-3732

GA 23

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----- x  
ANTHONY B. CATALDO and :  
ADA W. CATALDO,

AFFIDAVIT

Docket No.  
74-2537

Plaintiffs-Appellants, :

- v - :

UNITED STATES OF AMERICA,

Defendant-Appellee.

----- x  
STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

DAVID P. LAND, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and I submit this affidavit in support of the motion to dismiss the Notice of Appeal filed by Anthony B. Cataldo on November 15, 1974. The basis for dismissal is that the Notice of Appeal was not timely filed. The relevant facts giving rise to this motion are as follows:

ONLY COPY AVAILABLE EA 24

DPL:eb  
74-3732

2. In 1969 plaintiffs commenced a tax refund suit in the United States District Court for the Southern District of New York. Plaintiff Anthony B. Cataldo, an attorney, represented both himself and his co-plaintiff wife. The action was tried before Judge Levet without a jury who, on June 29, 1973, entered his Opinion, Findings of Fact and Conclusions of Law dismissing the complaint. During the course of that trial, Judge Levet found Mr. Cataldo in contempt of court and fined him \$50.00. That contempt judgment was entered on May 18, 1973 and the fine was paid. Plaintiffs took an appeal to this Court, and the Court affirmed dismissal of the tax refund suit. As to the contempt judgment, this Court in its opinion of June 25, 1974 (No. 1105, Docket No. 73-2602) stated:

"Although appellants proffer various arguments attacking the validity of this latter [contempt] judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review."

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GA 25

DPL:eb  
74-3732

By Notice of Motion dated October 1, 1974, Mr. Cataldo moved before Judge Levet for an order "remitting the [\$50.00] penalty." By memorandum opinion filed on October 17, 1974, Judge Levet denied Mr. Cataldo's motion. On November 15, 1974 Mr. Cataldo filed a Notice of Appeal from Judge Levet's October 17, 1974 order. On November 22, 1974, the United States moved before Judge Levet for an order directing Mr. Cataldo to file a \$250 appellate cost bond or other security. In opposition to that motion, Mr. Cataldo in his December 4, 1974 affidavit represented that: "The instant appeal is not a Civil Appeal. It is a criminal appeal." Because security for costs is required in civil but not criminal appeals, the United States in reliance upon Mr. Cataldo's representation that his appeal was a criminal appeal withdrew its motion to require the posting of security. The United States also advised Mr. Cataldo that because his appeal was a criminal appeal, his Notice of Appeal was not timely filed. Nevertheless, Mr. Cataldo has pressed ahead with his appeal which necessitates this motion.

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DPL:ab  
74-3732

GA 26

3. The Notice of Appeal was not timely filed and therefore it is subject to dismissal. The order appealed from was entered on October 17, 1974 and the Notice of Appeal was filed on November 15, 1974. Mr. Cataldo represents that his current appeal is from a criminal matter. Rule 4(b) of the Federal Rules of Appellate Procedure provides that "In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from." Mr. Cataldo did not file his Notice of Appeal within the 10-day period prescribed by Rule 4(b). Accordingly, having failed to file a timely Notice of Appeal, the appeal is subject to dismissal.

4. Mr. Cataldo has been a frequent and unsuccessful pro se litigant of his personal tax matters before this Court. The reported cases are as follows: Cataldo v. Comm., 499 F. 2d 550 (2d Cir. 1974), aff'd 60 T.C. 522 (1973); Cataldo v. United States, 74-2 USTC ¶9534 (2d Cir. 1974), aff'd 73-2 USTC ¶9585 (S.D.N.Y. 1973); Cataldo v. United States, 456 F. 2d 1335 (2d Cir. 1973), cert. denied, 409 U.S. 848, aff'd 73-1 USTC ¶9325 (S.D.N.Y. 1971); and Cataldo v. Comm., 476 F. 2d 628 (2d Cir. 1973), aff'd 30 T.C.M. 934 (1971). Thus, because

DPL:eb  
74-3732

Mr. Cataldo has been before this Court on four previous occasions, he surely must know of the time limitations in which to file a timely Notice of Appeal.

WHEREFORE, it is respectfully requested that an order be entered dismissing the Notice of Appeal.

15/

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DAVID P. LAND  
Assistant United States Attorney

Sworn to before me this  
9<sup>th</sup> day of January, 1975

Notary Public, State of New York  
No. 41-29000, Queens Co., NY  
Term Expires March 30, 1975

Form 280 A-Affidavit of Service by Mail  
Rev. ^/72

GA 28  
CA 74-2537

AFFIDAVIT OF MAILING

State of New York ) ss  
County of New York )

Pauline Troia being duly sworn,  
deposes and says that he is employed in the Office of the  
United States Attorney for the Southern District of New York.

That on the 10th day of  
January 1975 he served a copy of the within  
govt's motion to dismiss appeal filed 11/15/75,  
by placing the same in a properly postpaid franked envelope  
addressed:

Anthony B. Cataldo,  
111 Broadway  
New York, N.Y. 10006

And deponent further says  
he sealed the said envelope and placed the same in the  
mail chute drop for mailing in the United States Courthouse,  
Foley Square, Borough of Manhattan, City of New York.

/sl/

Sworn to before me this

10th day of January 19 75

WALTER G. BRANNON  
Notary Public, State of New York  
No. 24-0394500  
Qualified in Kings County  
Cert. filed in New York County  
Term Expires March 31, 1978

Affidavit of Anthony B. Cataldo,  
dated January 14, 1975

GA 29

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

-----x  
ANTHONY B. CATALDO and :  
ATA V. CATALDO,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

Docket No.

74-2537

Affidavit in

Opposition to

In the Matter of the Civil Contempt of :

Motion to Dismiss

ANTHONY B. CATALDO

Appeal

Appellant.

-----x  
STATE OF NEW YORK )  
) ss:  
COUNTY OF NEW YORK)

ANTHONY B. CATALDO, being duly sworn deposes and says that he is the appellant. He is an attorney at law practicing for more than 40 years and is in good standing. A motion is being made to dismiss this appeal from an alleged order of contempt made by the Hon. Richard H. Levet.

The ground of the motion is said to be that this appeal is too late. This is not the case, the appeal is timely. The time to count is ten days from the entry of the judgment or order appealed from if a criminal judgment or order, see Rule 4 (b) of the Rules of Appellate Practice. If it is a civil judgment or order, the time is 30 days from the entry of said order or judgment, see Rule 4 (a). The notice of appeal was filed November 15, 1974.

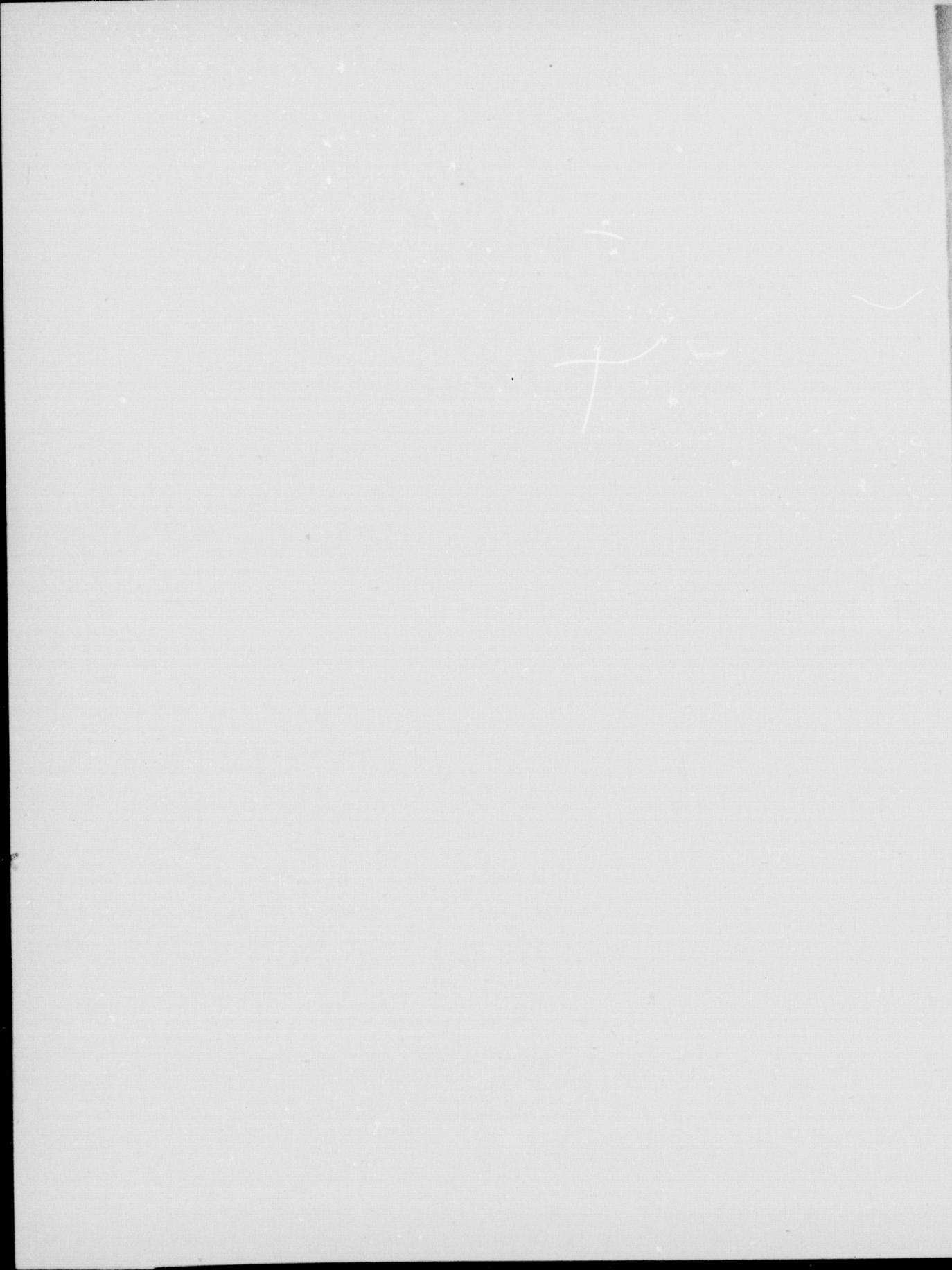
The notice of appeal is timely, if the order appealed from is a Civil order. The caption states it is a Civil order of contempt and it was entered in the civil docket under the name of the civil case in which it was made. The date of its entry in the Civil docket is October 17, 1974. Hence, it is timely if it is a Civil Appeal.

This court said of the original order of contempt on the appeal from the judgment in the civil suit that the order was criminal in nature, hence, as no separate appeal was taken, it had no jurisdiction.

However, Rule 4(b) does state that "A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket." Also, the same Rule 4(b) states; "A notice of appeal filed after the announcement of a decision, sentence or order, but before entry of the judgment or order, shall be treated as filed after such entry and on the day thereof." The order appealed from is an order denying appellant's motion to vacate the original order of contempt or to resettle it. Neither said order, nor the original order of contempt have been entered in the criminal docket of the court below. Hence, the time to appeal from either order has not commenced to run except from the date of the filing of the notice of appeal. Consequently, as a criminal order the appeal taken is timely.

Appellant objects to the evident fury of Mr. Land in pressing motions for relief not available to him, and yet, the request is made deceptively with half-truths and non-sequitors. Is there any justification for Mr. Land asserting that the ten day period starts with the date of entry in the civil docket with the entry of the order in the Criminal docket. Also, any lawyer would first check the criminal docket to see if the other provisions of Rule 4(b) apply before making a claim in disregard of those provisions.

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Also in the instant application, Mr. Land refers to four tax suits pressed by deponent to correct assessments. The decision of the trial courts were erroneous in each one of them. This court declined to find the error reversible. Deponent incurred a liability for taxes that were unjust. Of what relevance has the bringing of these four suits got to this motion to dismiss an appeal regarding an order of contempt? Obviously, none, except in illogical thinking.

WHEREFORE deponent respectfully prays this court to deny this motion to dismiss with costs.

Sworn to before me this  
14th day of January, 1975.

Anthony B Cataldo

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